

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|--------------------------------|
| BRIAN MILLER, | § |
| | § |
| Defendant Below- | § No. 3, 2010 |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for New Castle County |
| | § Cr. ID 0812017102 |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: June 22, 2010
Decided: August 24, 2010

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 24th day of August 2010, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) A Superior Court jury convicted the defendant-appellant, Brian Miller (Miller), of multiple drug-related charges, including trafficking cocaine. The Superior Court sentenced Miller to a total period of sixteen years at Level V incarceration, to be suspended after serving two years for decreasing levels of supervision. This is Miller's direct appeal.

(2) Miller's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Miller's counsel asserts that, based upon a

complete and careful examination of the record, there are no arguably appealable issues. By letter, Miller's attorney informed him of the provisions of Rule 26(c) and provided Miller with a copy of the motion to withdraw and the accompanying brief. Miller also was informed of his right to supplement his attorney's presentation. Miller has raised several issues for this Court's consideration. The State has responded to Miller's points, as well as to the position taken by Miller's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) The trial record reflects that, on December 23, 2008, probation officers conducted an administrative search of Miller's home. They found approximately 11.8 grams of cocaine, 4.45 grams of marijuana, and paraphernalia including a razor, plate, and electronic scale. Both Miller and

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

his wife, Yolanda, were present during the search. Both were arrested. Miller initially denied that he knew anything about the drugs but later confessed that the drugs were his. His wife pled guilty to possession with intent to deliver. Miller went to a jury trial in September 2009. On the day trial was scheduled to begin, new counsel entered an appearance on Miller's behalf and filed a motion to suppress. The judge denied the motion to suppress as untimely and also denied counsel's request to file the suppression motion out of time. At trial, Miller's wife testified that the drugs and paraphernalia found during the search were hers and that her husband had no knowledge of her drug use or the drugs found in the house. The jury found Miller guilty of trafficking cocaine, maintaining a dwelling, second degree conspiracy, and possession of cocaine. Miller filed a motion for new trial, which the Superior Court denied. This appeal followed.

(5) Miller has raised three issues in response to his counsel's motion to withdraw. First, he contends that the evidence was insufficient to sustain his convictions. Second, he argues that the trial court abused its discretion in denying his untimely motion to suppress and in denying his motion for a new trial. Finally, Miller argues that his trial counsel was ineffective for failing to file a timely suppression motion. With respect to his third claim, this Court will not consider an ineffective assistance of

counsel claim for the first time on direct appeal.² Accordingly, we will not address this claim but will review his remaining two claims.

(6) Miller first challenges the sufficiency of the evidence to sustain his convictions. In reviewing such a claim, this Court must determine whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the defendant guilty beyond a reasonable doubt.³ The gist of Miller's complaint appears to be that the jury should have believed his wife's testimony claiming that the drugs were hers and that Miller had no knowledge about them, notwithstanding Miller's earlier confession to the police that the drugs were his. It was for the jury, however, to determine the weight of the evidence and to resolve any conflicts in the testimony.⁴ In this case, we find the evidence against Miller more than sufficient to sustain his convictions.

(7) Miller next argues that the Superior Court abused its discretion in denying his untimely motion for an extension to file a motion to suppress and in denying his motion for a new trial, which was based on the Superior Court's refusal to consider the untimely suppression motion. The record

² *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).

³ *Word v. State*, 801 A.2d 927, 929 (Del. 2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

⁴ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

reflects that Miller was arrested in December 2008 and a public defender was appointed to represent him. On the eve of trial, Miller retained private counsel who entered his appearance on the first day of trial. The morning of trial, new counsel filed a suppression motion and orally made a request for the Superior Court to consider his motion out of time.

(8) The Superior Court concluded that the change in Miller's representation was no excuse for the untimely suppression motion because prior counsel could have filed the motion if he had believed there was a basis to do so. Moreover, the Superior Court did not find exceptional circumstances to warrant consideration of the untimely motion sufficient to outweigh the countervailing interest in ensuring the timely and orderly processing of the Superior Court's criminal docket. After careful consideration, we find this ruling was a proper exercise of the trial court's broad discretion to enforce its rules of procedure and pretrial orders.⁵

(9) Furthermore, we find no abuse of discretion in the Superior Court's denial of Miller's motion for a new trial.⁶ The basis for the motion was appointed counsel's failure to file a timely suppression motion. Rather than address the merits of Miller's claim of ineffective assistance of counsel,

⁵ *Barnett v. State*, 691 A.2d 614, 616 (Del. 1997).

⁶ *Hicks v. State*, 913 A.2d 1189, 1193 (Del. 2006).

the trial court determined that review of appointed counsel's decision not to file a suppression motion would be more appropriately considered in the context of a timely-filed postconviction motion. We find no abuse of discretion in that ruling.⁷

(10) This Court has reviewed the record carefully and has concluded that Miller's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Miller's counsel has made a conscientious effort to examine the record and the law and has properly determined that Miller could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁷ See *Barnett v. State*, 691 A.2d at 616-17 (noting that trial counsel's failure to file a suppression motion was best considered in a postconviction motion).